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Supreme Court of the United States

October Term, 1969

No. 1668 Misc.

HERMAN BENJAMIN FERGUSON and
ARTHUR HARRIS,
Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, State of New York

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Introduction	1
Opinion Below	2
Jurisdiction	3
Questions Presented	3
Statutes Involved	3
Statement of the Case	4
The Facts	6
Argument	
Point I—A State trial judge refused to grant a mistrial requested on the grounds that testimony admitted was unduly prejudicial. Nothing in the due process clause of the Fourteenth Amendment mandates, as a matter of federal constitutional law, that a State court may not exercise such discretion within the bounds of State law	9
Point II—Nothing in the due process clause or the Fourth Amendment makes inadmissible testimony in open court of a police officer who obtained his information as an undercover agent.	17
Point III—The issuance and execution of the search warrants were in all respects valid.	18
Conclusion	20

TABLE OF AUTHORITIES

Cases:	Page
Brady v. North Carolina, 344 U.S. 424 (1953)	14
Brown v. Mississippi, 297 U.S. 278 (1936)	11
Chimel v. California, 395 U.S. 752 (1969)	19
Gori v. United States, 367 U.S. 364 (1961)	15
Hoffa v. United States, 385 U.S. 293 (1966)	18
In Re Oliver, 333 U.S. 257 (1948)	11
Lopez v. United States, 373 U.S. 427 (1963)	17
Marshall v. United States, 360 U.S. 310 (1959)	13
Mooney v. Holohan, 294 U.S. 103 (1935)	11
Moore v. Dempsey, 261 U.S. 86 (1923)	11
Osborn v. United States, 385 U.S. 323 (1966)	18
People v. Misuraca, 16 N.Y.2d 542 (1965)	19
Powell v. Alabama, 287 U.S. 45 (1932)	11
Tumey v. Ohio, 273 U.S. 510 (1927)	11
United States v. Perez, 22 U.S. 579 (1924)	14
Other Authorities:	
United States Constitution, Fourteenth Amendent	11, 17
United States Constitution, Fourth Amendment	17
United States Constitution, Fifth Amendment	19
28 U.S.C. §1257(3)	9
New York Code of Criminal Procedure §801	19
23 A Corpus Juris Secundum §1386	14

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No. 1660 Misc.

HERMAN BENJAMIN FERGUSON and ARTHUR HARRIS,
Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, State of New York

BRIEF IN OPPOSITION

Introduction

This is a brief in behalf of respondent in opposition to a petition for a writ of certiorari to the highest court of the State of New York, the Court of Appeals. Petitioners were convicted of the crime of Conspiracy to commit Murder in the First Degree contrary to the New York Penal Law §580-a—[since repealed in its entirety and reenacted as Conspiracy in the First Degree, §105.15 Penal Law] after trial before Mr. Justice Balsam and a jury in the Supreme

Court of the State of New York, County of Queens. Judgment of conviction was entered on October 3, 1968 and petitioners each were sentenced to from three and one-half to seven years imprisonment.

Opinion Below

The intermediate appellate tribunal below affirmed the conviction on July 7, 1969. The memorandum of that court —the Supreme Court of the State of New York, Appellate Division, Second Department—is reported in 32 A D 2d 936 and in 302 N.Y.S. 2d 950. The memorandum is also reproduced in the Brief on Reargument for Appellee District Attorney in *Samuels et al.* v. *Mackell et al.* and *Fernandez* v. *Mackell et al.* [Nos. 11 and 20, Oct. Term, 1969] at pages A13-A16. That memorandum states that petitioners "claim several bases for reversal, all of which have been unanimously rejected by this court, except for the claim that the Criminal Term should have granted a mistrial and an adjournment of the trial until the fall of 1968 on the ground that the emotional impact of the assassination of Senator Robert Kennedy during the trial rendered it impossible for defendants to get a fair trial." Three judges rejected this single exception as grounds for reversal and two others dissented in memorandum.

On December 11, 1969, the Court of Appeals affirmed, four judges concurring "on the opinion at the Appellate Division", and three judges dissenting "on the dissenting opinion at the Appellate Division". The affirmance is reported in 26 N. Y. 2d ——.

Jurisdiction

The jurisdiction of this Court to review by way of certiorari is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Does the due process clause of the Fourteenth Amendment mandate that a mistrial be granted in a State criminal proceeding in New York against two defendants charged with conspiracy to murder two Negro civil rights leaders, merely on the grounds that someone else—Robert F. Kennedy—whose name appeared on a list of five marked for assassination, was at the time near death from bullets fired in California by a third person in no way connected with the New York conspiracy and arrested on the spot?

2. Does a State conviction based upon testimony at an open trial by a police officer who obtained his information as an undercover agent violate the due process clause of the Fourteenth Amendment?

3. Whether or not the issuance and execution of search warrants violated the due process clause of the Fourteenth Amendment?

Statutes Involved

The highest court of the State upon granting a motion to amend the remittitur certified that they necessarily passed upon "questions under the Constitution of the United States, viz., whether the rights of the defendant under the First, Fourth, Fifth and Fourteenth Amendments

were denied". These are set forth in the petition [Typewritten pages 6-8]. Petitioners also claim that certain provisions of State statutes relating to search warrants [*N.Y. Code Crim. Proc.* §§796, 801], indictments [*id.* §274] and confrontation at trial [*id.* §8] are also involved. These statutory provisions are also set forth in the petition [pp. 8-9].

Statement of the Case

On June 20, 1967, a grand jury of 22 persons in the County of Queens, New York, after hearing evidence about a revolutionary action movement, returned two indictments:

I

The first indictment [No. 1294-1967] charged five different crimes in seventeen counts against seventeen defendants, including the two petitioners in this case. This indictment was superseded by the identical grand jury on January 15, 1968 by another [No. 134-1968]. The superseding indictment charged fifteen of the defendants, including the two petitioners, with the identical five crimes in forty-eight counts. Forty-one of these counts charged crimes of possession of dangerous weapons. This indictment charged defendants with collecting an arsenal of weapons, explosives and incendiary devices, and devising a detailed blueprint and timetable for their use. The objective of this movement was the overthrow and paralysis of local government on and under the State level.

Under this indictment, all defendants, including both petitioners, are charged with advocacy of and conspiracy to

commit the crime of criminal anarchy (counts 1-4 [former N.Y. Penal Law §§160, 161 (1), (2), (4) and 580 (1)]; nine defendants, including both petitioners, with conspiracy to commit the crime of arson (count 5 [*id.* §§580-a, 223]), and nine defendants, including both petitioners, with possession of dangerous weapons (counts 8-48 [*id.* §1897 (2) (3) (9)]). With respect to dangerous weapons, petitioner Ferguson is charged exclusively in fifteen of the forty-one counts (counts 13-27) and petitioner Harris in four (counts 28-31).

Injunction against prosecution of this indictment was sought by eleven of the fifteen defendants, including the two petitioners, in a three-judge district court on March 12, 1968, and denied by that court in opinion. *Samuels et al.* v. *Mackell, et al.*, and *Fernandez* v. *Mackell et al.*, 288 F. Supp. 348 (S.D.N.Y. 1968). Probable jurisdiction was noted by this Court on December 9, 1968. (393 U.S. 975.) These cases as Nos. 580 and 813, October Term 1968, were argued on April 1, 1968. Reargument during the October 1969 Term as Nos. 11 and 20 was ordered on June 16, 1969. (395 U.S. 957.)

II

A second indictment found by the identical grand jury on the same day charged in a single count but one crime, Conspiracy to commit the crime of Murder, First Degree [former N.Y. Penal Law §§580-a, 1044] against two of the defendants accused in the first indictment. This indictment [No. 1223-1967] was superseded on February 21, 1968 by the identical grand jury with another indictment charging the petitioners with the identical crime. This indictment was tried before State Supreme Court Justice Paul D.

Balsam and a jury in the Supreme Court, State of New York, County of Queens; and resulted in a verdict of guilty as charged by the jury on June 15, 1968. Judgment of conviction and sentence of three and one-half to seven years' imprisonment was rendered on October 3, 1968. Conviction was affirmed by the Supreme Court, State of New York, Appellate Division, Second Department, on July 7, 1969 with memorandum reported in 32 A.D. 2d 936 and in 302 N.Y.S. 2d 950, and by the Court of Appeals, State of New York, on December 11, 1969, upon the opinion of the Appellate Division and is reported in 26 N.Y. 2d ——.

The Facts

Both petitioners were charged in the indictment with conspiracy to murder Roy Wilkins, Executive Director of the National Association for the Advancement of Colored People (NAACP) and Whitney Young, Executive Director of the Urban League. This conspiracy was known as "Project Y" of the revolutionary action movement and was to be executed by petitioners Ferguson and Harris with the aid of an undercover police officer.

In October, 1965, an undercover police officer infiltrated a movement centered in the Jamaica section of Queens. This group, known as the Black Brotherhood Improvement Association, was part of an overall movement which had as its purpose a program to overthrow and paralyze local government, in order that the black people should attain full freedom from their oppressors.

The group initially met in the home of petitioner Ferguson, the leader of the organization, and later at other loca-

tions. As a cover, a rifle and pistol club was organized for the purpose of obtaining guns and ammunition, and training members in their use.

In order to attain the objectives of the group, it was decided in October and November of 1966 that two moderate civil rights leaders, Roy Wilkins and Whitney Young, should be killed. The reason for the proposed murders was that Young and Wilkins were too moderate to suit petitioners. They were "Uncle Toms" who "continually sold out the people." Petitioners felt that if Wilkins and Young were assassinated, their voices would be stilled and black people would thereafter follow the leadership of men like petitioners who advocated violent revolution.

On November 1, 1966, petitioner Ferguson told the undercover police officer that he had met one Max Stanford, a leading member of an organization known as the Revolutionary Action Movement (RAM). Stanford told Ferguson that the proposed acts of terror would not interfere with the operations of any other revolutionary organization and that it was alright to proceed with the plan of assassination.

On December 27, 1966, Ferguson informed Harris and the undercover policeman that the three of them should work together on Project Y. On January 5, 1967, Ferguson told Harris and the undercover police agent that he had a contact man who would sell him five pistols for $200 in connection with Project Y. On January 18, 1967, Harris told the undercover agent that after the pistols were obtained, they could go ahead with the plans to kill Wilkins and Young. On March 27, 1967, Ferguson met with Harris, the undercover agent and another member of the movement,

Milton Ellis, in Ferguson's automobile. Ferguson showed them six pistols, one .32 calibre, and five .25 calibre, together with ammunition.

On April 8, 1967, after having previously conferred with Ferguson, Harris and the undercover police officer drove to 147-15 Village Road, in Queens County, the residence of Roy Wilkins, for the purpose of "casing" the area in preparation for Wilkins' murder. After the reconnaisance mission, Harris and the undercover man met with Ferguson in the basement of a store owned by George Samuels, another member of the movement, located at 120-03 New York Boulevard, Queens County. The three men discussed the visit to Wilkins' residence by Harris and the undercover man. Harris and Ferguson decided that the best way to assassinate Wilkins would be to ambush him as he returned from a social affair. One of the three members of the assassination team would attend the function at which Wilkins was present. The other two would lie in wait in the area of Wilkins' residence. The conspirator attending the function would telephone when Wilkins was leaving to alert the two triggermen. Wearing ski-masks as a disguise, the gunmen would then shoot Mr. Wilkins as he arrived home. The purpose of the disguise was to prevent recognition by Wilkins' wife, if she accompained him.

On May 28, 1967, Ferguson told Harris and the undercover man that choosing the time for killing Wilkins was very important. It was necessary that there be no doubt that the assassination be connected with the "black revolutionary movement." As soon as one of the ghetto schools "became controlled by black people" it could be depended

upon that Roy Wilkins would begin to make "objectionable statements." Then the murder would be accomplished.

Petitioners and several others were arrested on the morning of June 21, 1967 upon indictment of the grand jury.

ARGUMENT

POINT I

A State trial judge refused to grant a mistrial requested on the grounds that testimony admitted was unduly prejudicial. Nothing in the due process clause of the Fourteenth Amendment mandates, as a matter of federal constitutional law, that a State court may not exercise such discretion within the bounds of State law.

The sole question that was not unanimously disposed of by both State appellate courts was—in their own words—"The claim that the Criminal Term should have granted a mistrial and an adjournment of the trial until the fall of 1968 on the ground that the emotional impact of the assassination of Senator Robert Kennedy during the trial rendered it impossible for defendants to get a fair trial." 32 A D 2d 936, 302 N.Y.S.2d 950; 26 N.Y. 2d ——.

The position of respondent is clear and emphatic to the effect that—whatever the significance of this determination under State rules governing the conduct of State trials—it raises no question "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. §1257(3).

Both State appellate tribunals have held that the denial of a mistrial was within the discretion of the trial judge, and that this denial, under the circumstances of this case, constituted no abuse of that discretion. Seven State appellate judges have found:

"(1) that no substantial constructive purpose would have been served in declaring a mistrial and adjourning the trial until the fall;

(2) that it is unrealistic to say that the trial court should have anticipated that at an adjourned date any substantial attenuation of the emotional impact of the Robert Kennedy assassination could have been achieved;

(3) that to effect any significant constructive adjournment in this as well as in similar cases would require waiting for a period when there will be a hiatus of violence, which would be tantamount to declaring a moratorium on all prosecutions for similar acts of violence;

(4) that the suspension of the trial over the three-day weekend following the Senator's death accomplished as much in the way of reducing any possible prejudice as a more prolonged adjournment would have accomplished;

(5) that to reason that an act of violence such as the Robert Kennedy assassination was of such prejudicial emotional significance as to render a fair trial at bar impossible is, if carried to a logical conclusion, to justify an indefinite postponement and would result in the frustration of the effective administration of justice because subsequent widely publicized acts of violence could then render the perpetrators of prior similar acts practically immune from prosecution."

32 A.D. 2d 936 at 937-938, 302 N.Y.S.2d 950 at 952; 26 N.Y. 2d ——.

The ruling thus sustained raises no federal question. The due process clause of the Fourteenth Amendment has been construed to require States to provide criminal trials before juries free from intimidation [see *Moore* v. *Dempsey,* 261 U.S. 86 (1923)] and judges without pecuniary interest in the outcome [*Tumey* v. *Ohio,* 273 U.S. 510 (1927); in public [*In re Oliver,* 333 U.S. 257 (1948)]; with the assistanec of defense counsel [*Powell* v. *Alabama,* 287 U.S. 45 (1932)]; and with evidence that is neither obtained by coerced confessions [*Brown* v. *Mississippi,* 297 U.S. 278 (1936)], nor suppressed by the prosecution [*Mooney* v. *Holohan,* 294 U.S. 103 (1935)]. Nothing on the measurement of State criminal proceedings against standards of fairness imposed by federal due process—either in these early pronouncements of the Court or in any later ones—suggests review of the exercise of discretion of the trial judge either in admitting or excluding palpably relevant evidence, or in granting or denying mistrials or adjournments.

Moreover, even had this been a trial in the federal courts under the supervisory jurisdiction of the Supreme Court, no question is presented requiring reversal.

Petitioners contend that because a prosecution witness recited five names on a list proposed for assassination, and one of these five—Robert Kennedy—at that time was in fact near death in California from bullets fired by an assassin, they were entitled to a mistrial as a matter of law,

notwithstanding repeated cautionary instructions by the trial judge to the jury.

The position of respondent is that first, the evidence elicited was entirely material, relevant and competent, and accordingly not unfairly prejudicial; second, the evidence was necessary for presentation of the prosecution's case; and third, if any conceivable unfair prejudice could have arisen, it was cured by subsequent instructions of the trial judge to the jury.

In this case of conspiracy to murder, evidence concerning the list of names of persons whom petitioners contemplated murdering was relevant to show the meaning and character of their subsequent acts. It was also relevant on the question of the intent, purpose and design of petitioners concerning their murderous plans.

Further, the introduction into evidence of testimony concerning the proposed assassination of Mr. Kennedy was not just peripherally relevant. It was of extreme importance to the proper presentation of the People's case. If the name of Robert Kennedy was excised from the assassination list, the jury would have been given the false impression that petitioners' aim and purpose was to liquidate only Negro civil rights leaders and recalcitrant members of their own and similar organizations. The purpose of these people went much further than that. The prosecution had a right to show this in order to demonstrate to the jury the full nature and extent of petitioners' plans.

The common characteristic of the names of the prominent persons on petitioners' list was not that they were Negroes but that they were civil rights leaders who advocated a legal non-violent solution to social problems. Whether they were black or white made no difference. They were competing voices in the field of civil rights who proposed plans radically different from those of petitioners. For the petitioners' own method of operation, calling for the waging of street warfare and wholesale violence to gain widespread support, petitioners felt it was necessary to eliminate those who disagreed with them. This the jury was entitled to know and this the People had a right to prove.

The introduction of the name of Robert Kennedy was not done by the prosecution for the purpose of unfairly prejudicing the defense. From the inception of the case, before any assassination, it was the intention of the People to present this evidence. As a matter of fact, the proposal of petitioner Ferguson to murder Robert Kennedy, along with Whitney Young and Roy Wilkins, was one of the factors establishing probable cause for the issuance of the search warrants and was included in the affidavits of Detective McCambridge sworn to one year before the trial.

The law is clear that a trial judge has a great deal of discretion in deciding when to grant a mistrial. It is only under the most extreme and unusual circumstances, however, that this discretion should be exercised. The trial court's decision in refusing to grant a mistrial should be overturned only in a case where a clear and obvious abuse of discretion occurred. See, e.g., *Marshall* v. *United States,* 360 U.S. 310 (1959).

The law has long been settled that it is not an abuse of discretion not to declare a mistrial when the trial court is satisfied that no injustice has resulted or will result [23A *Corpus Juris Secundum* §1386, p. 1037].

In *United States* v. *Perez,* 22 U.S. 579 at 580 (1824), the authoritative starting point of the law in this field, Mr. Justice Story, for the unanimous Court, stated the principles that have guided the federal trial courts without interruption on the question of mistrial:

> "* * * We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. * * *"

In *Brock* v. *North Carolina,* 344 U.S. 424 at 427 (1953), the Court observed:

> "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require

another panel to try the defendant if the ends of justice will be best served * * *."

In *Gori* v. *United States*, 367 U.S. 364 at 368, 369-70 (1961), the Court said per Mr. Justice Frankfurter:

> "[W]e have consistently declined to scrutinize with sharp surveillance the exercise of that discretion.
>
> * * *
>
> "It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused."

Only after considerable thought and much soul searching did the trial judge decide that, under the circumstances of this case, a mistrial was not warranted. As he said on the record on June 6, 1969, after Senator Kennedy had passed away:

> "Frankly, one of the reasons I didn't get down here to the courtroom until quarter of eleven this morning was that I was giving great thought to the facts that I expected that you were going to renew your motion in the light of the overall situation and I was kind of meditating.
>
> "It seems to me that given the situation in the event that nothing had happened to Senator Kennedy, we still in this day and age remember the assassinations that have taken place over the last five years, and they have all been unfortunate ones and traffic [tragic] ones, and now that we have this one which

is a current one, we are going to live with it for some time to come, it's not going to be expunged from the minds and hearts of people generally.

"I have given great thought to the fact that as this jury was selected that each one of your attorneys kept going with your questions to make sure you had a jury that indicated to you very strongly that they were going to decide this case on the facts and nothing else. Certain prospective jurors were questioned as to whether or not they were the victims of crime in the past and, if so, whether they would let that affect their judgment or let that enter into their deliberations, and I recall the Court entered into questioning the jurors. Everytime the District Attorney had asked whether or not if they felt that he had proved the case beyond a reasonable doubt, would they vote for a conviction and I didn't let an opportunity go by when I didn't say to them, 'If by the same token that you felt that the District Attorney had not proven his case beyond a reasonable doubt, would you hesitate to vote for an acquittal?' And, of course, we've gotten all those answers, and I got rid of all the jurors who either personally knew police officers or had relations in the Police Department. Then there were a few jurors that were excused by stipulation and then the prosecution had excused certain jurors. So that we finally got a jury that I feel are going to decide this case on the evidence that's going to be introduced in the court either by sworn testimony or by exhibits in evidence; and if we were to take the position that a jury of twelve men, because of what has happened in the last day or two, were going to look for anybody's scalp, it would be a sad state of affairs. We would reject the faith that so many people have in our American jury system, and I have observed these jurors and invariably they come up with the right decision based upon the facts that they have heard.

"The thing that I want to point out is, having in mind that these thoughts and these memories are not erased from their minds, in effect we would say that if the People ever indicted anybody for a situation, as in this particular case, that you could never go to trial because there would always be the thought in their mind as to what has transpired publicly, and I will not accept the proposition that this jury deliberating on this case will be affected by what has transpired, and for the purpose of this discussion, although we haven't asked them, we'll assume that they all know about this by now—this is a fair assumption—and accordingly, in light of what I have said, the Court denies the motion for a mistrial, and you have an exception to the Court's ruling" (369-373).

POINT II

Nothing in the due process clause or the Fourth Amendment makes inadmissible testimony in open court of a police officer who obtained his information as an undercover agent.

The undercover agent in the instant case used neither recorder nor transmitter, testified in open court and was subject to full cross-examination. The holding of the Court in *Lopez* v. *United States*, 373 U.S. 427 (1963) is dispositive of the contention that testimony of an undercover agent denies due process or rights under the Fourth Amendment. Said the Court [373 U.S. at 437-38]:

"Petitioner's remaining contentions concern the admissibility of the evidence relating to his conversation with Davis on October 24. His argument is primarily addressed to the recording of the conversation, which he claims was obtained in violation of his rights

under the Fourth Amendment. Recognizing the weakness of this position if Davis was properly permitted to testify about the same conversation, petitioner now challenges that testimony as well, although he failed to do so at the trial. His theory is that, in view of Davis' alleged falsification of his mission, he gained access to petitioner's office by misrepresentation and all evidence obtained in the office, i.e., his conversation with petitioner, was illegally 'seized.' In support of this theory, he relies on *Gouled* v. *United States*, 255 U.S. 298, 65 L. ed. 647, 41 S. Ct. 261, and *Silverman* v. *United States*, 365 U.S. 505, 5 L. ed. 2d 734, 81 S. Ct. 679. But under the circumstances of the present case, neither of these decisions lends any comfort to petition, and indeed their rationale buttresses the conclusion that the evidence was properly admitted" (*supra*, at pp. 437, 438).

See also, *Osborn* v. *United States*, 385 U.S. 323 (1266);
Hoffa v. *United States*, 385 U.S. 293 (1966).

POINT III

The issuance and execution of the search warrants were in all respects valid.

Petitioners, for the first time in the highest State court, challenged the search warrants in this case on the grounds of alleged non-compliance with certain directory provisions of a State statute relating to nighttime execution. The search warrants were executed after the arrests (also upon warrants) had been made. They were executed on the longest day of the year in New York—June 21st—when the sun rises at 4:13 A.M., Standard Time. The arrests were made at 5:30 A.M. Moreover, the warrants in fact con-

tained a direction that they might be executed at any time of the day or night. Petitioners contend that the affidavits in support of the warrants "did not request or set forth probable cause for the issuance of nighttime warrants as required by Section 801, Code of Criminal Procedure" (petition, p. 2). Even if the warrants had been executed at nighttime, the facts set forth in the supporting affidavits were sufficient to comply with the requirements of the State statute as construed by the State's highest court. See *People* v. *Misuraco*, 16 N.Y. 2d 542 (1965). In any event, compliance or non-compliance with such State directory provisions raises no federal question.

Petitioners also contended—again for the first time in the State's highest court—that even if the execution of the warrants in the nighttime was valid, their execution after indictment and after arrest, "is in violation of [petitioners'] rights under the Fifth Amendment of the United States Constitution" (petition, p. 3). The only way in which the items sought to be seized in this case, *i.e.* weapons and instruments for the commission of crime, could lawfully be obtained was by execution of a valid search warrant, even though the search followed arrest. *Chimel* v. *California*, 395 U.S. 752 (1969).

Petitioners' other contentions relate to the claimed invalidity of the search warrants as "void upon their faces" [Petitioners' brief in highest State court, p. 58], and upon various other grounds mentioned in the petition. In a motion to suppress before trial, petitioners explicitly waived a hearing, stating that they desired only to object to the admissibility of items introduced in evidence at the trial (Minutes of Hearing on Motion to Suppress, pp. 15-

19). The only seized items introduced in evidence at trial were weapons that were described with the utmost precision in both affidavits and warrants. Twelve State appellate judges, as well as three different State judges at the trial level, were unanimous that there was probable cause for the issuance of warrants upon the sworn affidavits.

Conclusion

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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